regulation.[29] However, the Order requires these costs, which were previously incorporated into rate adjustments, to be absorbed by the operator unless the operator submits a cost-of-service showing. Further, an above-inflation pass-through will constantly shrink the operators' operating profit margins. Even if increases in exogenous costs are matched dollar for dollar, the percentage profit decreases over time. As the operating profit margin decreases, so does the cable operator's return on the capital that it must invest to continue to provide services. This phenomenon will result in unreasonably low rates of return.

There is no indication that Congress or the Commission intended the industry to face such consequences. Indeed, even charges for installation and equipment, which must be "based on cost," include a provision for a reasonable profit. Order at ¶ 295. The very same congressional policy which requires the Commission to account for a reasonable profit in regulating programming and equipment applies to exogenous costs.[30] The Commission can remedy this problem by permitting cable operators to include a rate of return component, commensurate with each system's capital structure, in any rate adjustment that accounts for external costs. This approach is consistent both with the goals of Congress, with the Commission's treatment of other costs and with the basic regulatory principles described above.

29/ See, e.g., 47 C.F.R. § 65.820(d) (including cash working capital requirements in interstate rate base). As the Supreme Court explained in Hope, "[f]rom the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business." Hope, 320 U.S. at 603.

30/ See e.g., 47 U.S.C. § 543(b)(2)(C)(vii) (reasonable profit is one of the statutory factors in design of rate regulation scheme).

2. Cable Operators Must Recover External Costs Incurred Prior to the Date of Regulation.

The Order permits operators to recover increases in certain exogenous costs from the date of regulation forward; however, the price cap rules apparently, and without justification, do not provide a mechanism for recovery of increases in costs, except franchise fees, since September 30, 1992.[31] Because omission of these external cost increases has the effect of reducing the base on which future inflation adjustments are calculated, cable operators will be penalized on an ongoing basis so long as their rates are subject to regulation. And while the magnitude of the penalty will depend on the circumstances of each system, it will effect every operator that has increases in external costs that exceed inflation between September 30, 1992 and the initial date of regulation.[32]

There is no question that these external costs are legitimate costs that cable operators those rules must be adjusted to permit the recovery of external costs incurred since September 30, 1992.[34]

3. Exogenous Costs Should Include All Franchise Obligations, State and Local Assessments, Federal Taxes and Other External Costs.

The 1992 Cable Act explicitly provides that charges "of any kind imposed by State or local authorities . . . or any other fee, tax or assessment of generally applicability imposed by a governmental entity" are to be accounted for, while the Commission's Rules only provide that operators can pass through "state and local taxes."[35] The Commission should clarify that not only do state and local taxes qualify as pass through costs, but also other general fees assessed by governmental authorities, such as possessory interest fees, business license fees (whether imposed by the franchising authority or a higher governmental authority), and other exogenous costs imposed on cable operators by virtue of doing business in a locality.[36] This interpretation is supported by the plain language of the 1992 Cable

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34/ Among those costs are the very substantial costs attributable to implementation of the Commission's new regulations. The costs associated with compliance with rate regulation are daunting in themselves. In addition, operators are experiencing enormous costs regarding implementation of the mandatory carriage rules, including costs for retrapping and otherwise reconfiguring channel lineups mandated by the 1992 Cable Act and the Commission's rules.

35/ 47 U.S.C. § 543(b)(2)(C)(v), (vi) (emphasis added); 47 C.F.R. § 76.922(d).

36/ The Commission's rules specifically account for only "state and local taxes" and not federal taxes. 47 C.F.R. § 76.922(d)(2)(i). The imposition of "value added taxes" could render this omission especially important. The additional reference in the statute to taxes of "general applicability imposed by a governmental entity" could refer only to taxes imposed by the federal government. Otherwise, the language of the statute would be redundant. This interpretation is also consistent with the policy of allowing operators to recover costs that are beyond its control.

Act and its legislative history[37] which require consideration of <u>any</u> obligations imposed by governmental authorities on cable operators in determining an appropriate rate formula.

The Commission should also clarify the extent to which franchise obligations qualify

4. The Price Cap Rules Discourage Efficiency.

The Commission has asserted that "[u]nder a price cap, companies have an incentive to reduce costs and operate efficiently. [W]ith its emphasis on prices, a price cap alternative permits companies reducing costs faster than the industry, or the nation as a whole, to earn higher profits than other companies." Notice, 8 FCC Rcd at 523. The Order, however, is inconsistent with its theory. The Commission permits rate increases due to increases in exogenous costs, including programming costs, to the extent these cost increases exceed inflation. Conversely, if exogenous costs decrease or they increase less than the rate of inflation, then the operator must reduce rates.[39/] Thus, the operator actually has no incentive to reduce, for example, programming costs, because doing so may require the operator to drop rates. The Commission should not penalize the operator for achieving efficiencies.

5. Programming Purchased from Affiliated Entities Is Improperly Given Unfavorable Treatment.

The Order also limits an operator's ability to pass-through the increased costs for affiliated programming services; however, this restriction is not necessary to guard against unwarranted rate increases. There is no evidence in the record that programmer affiliation has any bearing on program charges by affiliated programming services. The Commission's new program access rules provide adequate protection against discrimination by affiliated programmers[40/] and the 1992 Cable Act permits the Commission to address and remedy

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39/ 47 C.F.R. § 922(d)(2); Order at ¶¶ 241, 257 n.609 and accompanying text.

40/ See, e.g. 47 C.F.R. §§ 76.1000 - .1003 instances of rate evasion. It is unreasonable to expect that any program vendor, whose service is widely distributed to unaffiliated cable operators, would seek to increase prices simply to benefit its affiliated operators.

The limitation on cost recovery for certain operators affiliated with programmers will, of course, directly and unfairly affect the rate of return for affiliated operators. While nonaffiliated operators will be permitted to pass through cost increases above inflation under the Commission's regulations, affiliated operators are limited to the lesser of the actual increase in costs or the inflation rate, thus practically denying affiliated operators any increases in costs above inflation. Given the current rules, an affiliated operator would thus have no alternative but to justify programming costs through a cost-of-service showing, a result that is inconsistent with the goals of Congress and the Commission.

F. Franchising Authorities Should Be Permitted to Approve Above Benchmark Rates Adapted Without Cost-of-Service Showings.

One of the most significant limitations of the Order's dichotomy between benchmark/price cap rates and cost-of-service showings is that it prevents franchising authorities from recognizing factors that affect a particular cable system without protracted formula) will not reflect their true costs, but the burden of engaging in a cost-of-service franchising authorities to respond to particular circumstances that implicate those statutory factors without engaging in a full cost-of-service proceeding helps to achieve those goals. It allows franchising authorities to follow a middle path between the cut-and-dried, but perhaps inaccurate, results of the benchmark rules and the difficult and time-consuming process of cost-of-service regulation. Reducing the need for cost-of-service showings will, of course, have the beneficial effect of reducing administrative burdens while assuring that the substantive requirements of the 1992 Cable Act are met as well.

G. The Commission's Equipment Rules Prevent Operators From Recovering Certain Costs and Making a Reasonable Profit.

Section 623(b)(3) requires the Commission to prescribe standards pursuant to which franchising authorities may establish rates, based on actual cost, for the installation and lease of equipment used by subscribers to receive basic service. Although the rules identify recoverable costs and a profit factor, they fail to include all relevant costs and do not allow recovery of a reasonable profit as required by Section 623(b)(2)(C)(vii).[42]

1. The 11.25 Percent Rate of Return for Costs in the Equipment Basket Is Arbitrary and Capricious.

41/ (...continued)
statute does not impose any substantive requirements beyond those embodied in the Commission's regulations. 47 U.S.C. § 543(a)(3).

42/ The Commission sidesteps the question of whether the availability of cable equipment in a community negates the need for regulation. Order at ¶ 282. Where operators can demonstrate commercial availability they should be exempt from regulation; additional study is not necessary. Alternatively, the Commission should hold its regulation in abeyance pending such study. Information of this kind is readily available.

The Commission stated that the Equipment Basket could include a reasonable profit no greater than 11.25 percent of the costs in the basket, based on the rate of return local exchange carriers ("LECs") are allowed to earn on regulated interstate access service.[43/] Determination of an appropriate rate of return is a critical element of the ratemaking process. An agency setting rates for a regulated company is constitutionally required to allow the company an opportunity to earn a rate of return that is not confiscatory. To be non-confiscatory, the company's rate of return must be comparable to those of unregulated companies with similar risks and high enough for the company to be able to attract capital.[44/]

To set an appropriate rate of return, an agency must analyze the risks involved in providing the regulated service. One measure of the level of risk for an industry is the cost of capital incurred by companies in that industry. Determination of the cost of capital is a complex process requiring extensive analysis of detailed financial information. The Commission's procedure for determining the rate of return used by local exchange carriers for their interstate access services exemplifies the detailed analysis that is required. The Commission analyzed well over 100 pleadings, reviewed expert testimony and explained its decision in a 56-page order.[45/]

43/ Order ¶ 295, n.715 (operator must justify a higher rate, if appropriate).

44/ See, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989); Hope, 320 U.S. 591; Jersey Central Power & Light v. F.E.R.C., 810 F.2d 1168 (D.C. Cir. 1987); Bluefield Waterworks v. Public Service Commission of West Virginia, 262 U.S. 679 (1923).

45/ See Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507 (1990) ("1990 Represcription Order"), recon., 6 FCC Rcd 7193 (1991), aff'd sub nom., Illinois Bell Telephone Co. v. F.C.C., 988 F.2d 1254 (1993).

Here, the Commission did not analyze the risks of leasing and installing cable equipment. Indeed, it acknowledged that it had a limited understanding of these risks. Rather than gathering the appropriate information and conducting the required analysis, the Commission assumed, without substantiation in a one paragraph footnote, that these risks were comparable to those involved in the provision of interstate access service by local exchange carriers. An agency decision must provide a "rational connection between the facts found and the choice made."[46] Here, the Commission found no facts and provided no explanation for its decision.[47] Had the Commission gathered the appropriate information, it would have found that leasing and installing cable equipment involves significantly greater risks than the provision of local exchange service. The services for which local exchange carriers are allowed to earn an 11.25 percent rate of return are, unlike cable television, essential services that are subject to virtually no competition.[48]

An analysis of financial market information confirms that for cable, use of a rate higher than 11.25 percent is appropriate. The level of competition in a particular industry is

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46/ State Farm, 463 U.S. at 43; see also 5 U.S.C. § 706(2)(A).

47/ See Burlington Truck Lines v. U.S., 371 U.S. 156, 167 (1962) ("There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion.")

48/ 1990 Represcription Order, 5 FCC Rcd at 7531 ("the LECs remain regulated monopoly providers of an essential public utility service.") Unlike local exchange services, the provision of video programming cannot be considered an essential public utility service. Congress recognized this in directing that cable operators are not to be regulated as common carriers. See 47 U.S.C. § 541(c). Many consumers have the ability to receive programming without subscribing to cable (and therefore require no cable equipment) and cable subscribers have the ability to purchase certain equipment, such as remote controls and non-addressable converters, from sources other than the system operator. See Cablevision Comments at 38, Continental Comments at 40.

a matter of public record and well known to the investment community. See 1990 Represcription Order, 5 FCC Rcd at 7531. A market-based rate of return will accurately reflect investor perceptions of current and future risks in the industry. An analysis of the returns required by investors in the cable industry proves that these risks are significantly higher than those involved in providing regulated monopoly local exchange services.[49]

2. Promotional and Equipment-Related Network Costs Should Be Recoverable.

The Commission correctly concluded that use of an actual cost standard for equipment rates requires that allocations for the indirect costs of leasing and installing equipment be included in the Equipment Basket. However, the Commission's failure to include allocations for all such indirect costs will result in equipment rates that are below the actual cost to the cable operator.

The Commission correctly concluded that it's rules should not prohibit promotional offerings for equipment and installation. Order at ¶ 301. In any business, a company's pricing of its products typically reflect all the costs of providing those products, including the costs of promotional offerings. Nonetheless the Order precludes recovery of these costs in the prices charged for equipment or in the permitted rates for regulated programming services. Id. at ¶ 302. An operator will thus be confronted with the choice of invoking a

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49/ See Report for Cablevision Industries Corporation prepared by Morgan Stanley & Co., Incorporated (June 1993). For example, over the past two years, the average bond yield for the major local exchange carriers has been between 7 and 9 percent. Over the same time period, the average bond yield for cable companies has been as low as 8 percent and as high as 15 percent. Id. This difference in bond yields reflects the greater risk faced by cable operators generally. Moreover, the risks faced by operators in providing equipment are even greater due to the widespread availability of certain equipment and the fast pace of technological change which quickly renders equipment obsolete.

general (and costly) cost-of-service proceeding or of limiting or eliminating promotional offerings. The likely decrease in promotional offerings conflicts with the Commission's determination that such offerings are in the public interest. A far preferable solution would be to allow operators to recover promotional costs in the equipment basket.[50/]

Section 623(b)(3)(B) directs the Commission to establish rates for the installation and use of connections for additional television receivers. 47 U.S.C. § 543(b)(3)(B). The Commission decided that most costs of the installation of additional connections will be included in the Equipment Basket and recovered in appropriate charges for the equipment and installation required for the additional connection. Order at ¶ 306. The Commission's rules also allow an operator to levy an additional charge for any added programming and customer premises equipment costs incurred as a result of the additional connection. These rules are unduly limiting. They fail to fully recognize the value to a subscriber of an additional connection, irrespective of any additional costs to the operator.[51/] Moreover, the Commission's treatment of programming provided on additional outlets is not mandated by the statute. The Commission relied on the fact that the statute applies the actual cost standard to the installation and "monthly use" of additional connections. 47 U.S.C. 543(b)(3)(B). However, the legislative history does not imply that "monthly use"

50/ To avoid the Commission's concern that promotional costs will be recovered in high charges for a single piece of equipment, such as remotes, the Commission should require the cost of promotional offerings to be recovered through increases in all non-promotional offerings.

51/ For further discussion, see supra part III.D.

was intended to cover anything more than a lease of the equipment necessary to connect the additional outlet.

An operator also may incur costs designing and building a cable system that can provide a signal strong enough to serve more than one outlet in a home. The Commission requires, however, that these network costs be treated as part of general system overhead rather than as costs to be included in the Equipment Basket. An operator can recover these costs only by making a cost-of-service showing. This result is inconsistent with the congressional desire for a system of rate regulation that is easy to administer and that compensates operators for the cost of providing the outlets.

IV. The Rules Deny Due Process and an Opportunity to Adequately Demonstrate that Rates are Reasonable.

A. Standardless Cost-of-Service Proceedings or Rate Reductions Without Hearings Are Each a Denial of Due Process.

Under the Due Process Clause of the Fifth Amendment to the Constitution, the Commission must establish rules which protect operators' due process rights with regard to ratemaking.[52] In addition, the Administrative Procedure Act generally requires a government agency to assure that due process requirements in the form of notice and a hearing are followed.[53]

52/ It is a well established principle that the due process protections of the Fifth Amendment are applicable to federal administrative agencies. See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950) ("Wong Yang Sung") ("the constitutional requirements of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeate every valid enactment of that body").

53/ In the context of local hearings on cost-of-service showings, the APA applies because (continued...)

The Commission's delegation of authority to franchising authorities for making cost-of-service showings absent standards by which they (and the Commission) should evaluate these showings fails to protect cable operators from having their rates lowered without knowing the standards by which these rates will be judged. Due process requires that parties affected by agency action be afforded procedural safeguards, including adequate notice and a fair hearing. SEC v. Chenery Corp., 318 U.S. 80 (1943). Implicit in these requirements is that the party being affected know the standards by which his actions will be judged under the Commission's regulations.[54/] In contrast, franchising authorities will be free to apply their own substantive standards to evaluate cost-of-service showings pending conclusion of a yet-to-be begun Commission proceeding.

According to the Order, "local authorities should have the option of providing for formal hearings or informal public meetings" regarding ratemaking decisions. Order at ¶ 127. Thus, local franchising authorities may reduce operators' rates, even to below benchmark levels, after a cost-of-service proceeding that does not include a full hearing. Though such decisions are appealable, the initial findings need only provide

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53/ (...continued)
the Commission has delegated the authority to issue a ratemaking order based on its own delegated authority. None of the exceptions to the APA rules on formal hearing apply here. See 5 U.S.C. § 553.

54/ Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated[.] The notice must be of such nature as reasonably to convey the required information[,] and it must afford a reasonable time for those interested to make their appearance." (citations omitted)). See also Dohany v. Rogers, 281 U.S. 362, 269 (1930) (Due process "is satisfied if [the party] has reasonable notice [with] due regard being had to the nature of the proceeding and the rights which may be affected by it." (citations omitted)).

interested parties an opportunity for comment. Id. at ¶¶ 126-27. Due process standards require that operators affected by agency action be granted an individual hearing when a property interest is affected.[55]

In determining what type of hearing is required, the Supreme Court has held that three factors should be considered: (1) the private interests affected by the agency's action; (2) the possibility that the agency's current procedures will erroneously deprive the party of its rights, and the countervailing reduction of this risk by the availability of alternate or additional procedures; and (3) the interests of the government including burdens imposed by additional procedures. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

The right to obtain a fair return on investment and recoup costs associated with that investment may not be the most compelling interest to be protected,[56] but the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit Court have recognized that due process is required when the right to a reasonable return is violated due to rate regulation.[57] Further, the Commission's procedures create a substantial both risk that an

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55/ See Wong Yang Sung, 339 U.S. at 49. The Supreme Court has recognized that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972) ("Roth").

56/ See Hope, 320 U.S. 591. See also In Re Permian Basin Area Rate Cases, 390 U.S. 747 (1968) ("Permian Basin") (A reviewing court must determine whether the rate order "may reasonably be expected to maintain [the regulated company's] financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests." Permian Basin, 390 U.S. at 792).

57/ Hope, 320 U.S. at 603; Permian Basin, 390 U.S. at 767-68; U.S. v. F.C.C, 707 F.2d 610, 612 (D.C. Cir. 1983). It is not the "weight" of the interest but rather the "nature" of the interest that is relevant for due process purposes. Roth, 408 U.S. at 570-71. The

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operator will be denied a fair opportunity to defend its rate and that the local authority will act in the absence of cost-of-service standards. The Commission has called for use of generally accepted accounting principles. Pending the adoption of formal standards, "[t]he extent to which costs can be recovered from subscribers will be governed by cost-of-services principles designed to be fair to cable operators and their subscribers."

Order at ¶ 400, n.977. Cost determinations are to be consistent with an operator's existing method of cost allocation. 47 C.F.R. § 76.924(d). This combination of cost accounting and allocation rules leaves local authorities great latitude[58] to accept or reject costs as appropriate at their whim.[59]

The failure to have cost-of-service standards in place puts operators in an untenable position: they would be required to justify rates without being apprised of the criteria by which they will be judged. That the Commission must adopt specific standards is evidence that such standards are indeed required and necessary for fair rate hearings and cannot be improvised until the standards are finalized. All cost-of-service proceedings must therefore be suspended pending adoption of standards.

57/ (...continued)
Supreme Court in noted that a property interest in which a party has "a legitimate claim of entitlement" is an interest that warrants the right to a hearing. Id. at 577. A cable operator's interest in recouping costs to enable it to fulfill its obligations under a franchise agreement is such a property interest; operators incur costs beyond their control to provide service with the expectation of being able to recoup those costs through the rates they charge, and likely obtain a reasonable rate of return.

58/ See id. at ¶¶ 271-72, ¶ 272 n.639.

59/ For instance, franchising authorities could deem market rate or collectively-bargained salaries to be excessive, or decide that cable operators should not be allowed to recover costs of lightly-viewed programming.

B. The Regulatory Scheme That Forces Operators to Undertake Cost-of-Service Showings Will Not Be Easy to Administer.

The Commission was required to adopt regulations that "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[60] Although the benchmark (or initially permitted rate) regulatory regime would, in most cases, be comparatively easier for all parties, a cost-of-service showing places substantial burdens on the operator, the franchising authority and the Commission. Potentially thousands of cost-of-service showings will be submitted to franchising authorities and the Commission for review, none of which have adequate resources to carry out this enormously complex regulatory process. Substantial revision of the benchmark regulations would promote administrative efficiency by making it practical for operators to choose the benchmark system as a form of rate regulation.

V. The Procedure for Increasing Rates is Unnecessarily Slow and Lacks Finality.

A. The Annual Restriction Rate Increases Rates is Unduly Burdensome.

The Commission has opted for administrative convenience by limiting the number of rate adjustments an operator may take during the year. Order, at ¶¶ 237-40, 396; 47 C.F.R. § 76.922(d). However, the cost of doing business (external costs as well as inflation related costs) does not accrue on an annual basis as operators experience increases in operating costs throughout the year. The Commission suggests an annual adjustment "will permit cable operators to recover the past year's inflation in the rates for the succeeding year." In other

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60/ 47 U.S.C. § 543(b)(2)(A). The House Report notes that Congress intended "the Commission to establish a formula that is not cumbersome for cable operators to implement nor for the relevant authorities to enforce." House Report at 83. (emphasis added).

words, operators will be permitted to recover last year's losses (losses caused by operating at rate levels that do not reflect current inflation) by increases in this year's rates. The regulations, in effect, amount to retroactive ratemaking, a practice long rejected by the courts.[61] Thus, the Commission's rate adjustment rule is not only impractical, but inconsistent with prior policy and legal precedent.[62]

The Commission should not be concerned with when an operator chooses to increase rates, but whether the increase in rates is justified.[63] The regulations should be revised to accommodate rate increases as necessary to keep the operator whole.[64] Regulated cable operators should have the flexibility to implement price cap adjustments prospectively consistent with predicted inflation levels. Excessive increases are unlikely, but if they do occur they are better handled after the fact rather than forcing operators to bear these costs up front.[65]

61/ Nader v. F.C.C., 520 F.2d 182, 202 (D.C. Cir. 1975) (the Commission may not prescribe rates to recoup past losses).

62/ The Commission also fails to provide for any return on the operator's investment. Rate adjustments must contemplate a return in addition to the pass through of cost increases.

63/ The Commission has determined that certain "exogenous costs" are presumed reasonable, and it requires franchising authorities to act on proposed increases based on such costs within 30 days. If the franchising authority fails to act, the increase goes into effect automatically. See Order at ¶ 133 n.355. Section 76.933(b) of the rules should be clarified accordingly.

64/ This could be achieved by allowing fixed annual rate increases, much like the permitted 5 percent rate increases envisioned in the 1984 Cable Act, subject to year-end adjustments to reflect actual above-inflationary cost increases or decreases.

65/ Under the Commission's proposal operators would never be able to catch up on lost revenues. For example, if cost increases drive per channel prices from $0.50 to $0.55 and the operator must await recovery of that $0.05 differential, the operator will be forced to

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B. Operators Should be Permitted to Increase Rates Subject to Accounting Orders.

A franchise authority has 30 days to make a rate determination after a cable operator has submitted its basic service tier rates for review. Under Section 76.933(b)(2) of the rules a franchising authority, however, may toll the 30-day deadline for an additional 150 days in cases involving cost-of-service showings, and for systems that submit FCC Form 393, for an additional 90 days. This potential delay of a rate determination for up to six, and four months respectively, is an unjustified burden on the cable operator. As was noted by the Community Antenna Television Association, "[t]he delays and uncertainties associated with local rate regulation was one of the reasons that an earlier Congress did away with [cable] rate regulation . . . it is incumbent upon the Commission to develop procedures that will not lend themselves to unnecessary delay." See CATA Comments at 30.

The Commission is required to balance the reasonable interests of cable operators (which are not wholly out of concert with those interests of cable consumers) with the goal of protecting consumers. See Conference Report at 51. The Commission erroneously focuses solely on the limitations which prevent a franchisor from making a speedy rate determination, in the guise of guarding "consumers' interests against potentially unreasonable rate increases."[66] Freezing rates for four to six-months will cause operators to postpone

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65/ (...continued)
provide service at a below-cost level and will, in addition, forego use of that $0.05 per channel per subscriber per month over time. A subsequent rate increase cannot compensate for those lost revenues; the operator will have been forced to derive capital from other sources to cover costs in the interim. Nowhere does the Order contemplate recovery of that cost of capital.

66/ Order, at ¶ 122, citing Conference Report at 60-62, House Report at 79.

the introduction of new services as well as delay investment in infrastructure and innovation. In addition, by the time the franchising authority makes a determination, the costs of service may have changed due solely to inflation.

No matter how sympathetic the Commission may be to the administrative difficulties faced by the local franchising authority, it has the responsibility of balancing a variety of interests. A refund order is a sufficient remedy for protecting the interests of consumers, especially in light of the significant harm a long delay would cause operators and the subscribers they serve. Therefore, operators should be permitted to put rate increases into effect thirty days after the submission of FCC Form 393 or after the submission of a cost-of-service showing, subject to an accounting order.

C. Franchise Authorities Must Take Final Action on Rates Within a Prescribed Time Period.

A cable operator must be able to make reliable projections of its future revenues in order to effectively plan its capital needs and participate in the capital markets. The Commission's rules, however, prevent a cable operator from being able to make the type of financial projections required by most lenders. This is because it may be well over a year before an operator can be certain that an established rate will be accepted by the local franchising authority. This lack of finality will make it more difficult and expensive to raise capital, thereby increasing the cost and the time required for operators to upgrade systems and provide new services.

There are two causes for this uncertainty. First, unless the rules are adjusted as described above, franchising authorities may take up to six months to analyze an operator's cost of service showing and four months to analyze a basic benchmark or price cap showing. As indicated, this extensive time period unreasonably limits an operator's ability to recoup its costs and provide new services to subscribers. Even if operators are allowed to charge a desired rate subject to an accounting order, however, there is still substantial uncertainty because the rules do not require a final franchising authority determination within a particular time frame. The unsettling nature of this lack of finality is magnified by the liability for refund payments, plus interest, for a one year period. 47 C.F.R. § 76.942(c). These uncertainties are made worse by the lack of specific cost of service standards. The net result is that for an indeterminate period of time the revenue generated by regulated cable services may be reduced by some amount that will be impossible to predict.

This sense of uncertainty over the ultimate validity of an operator's rates would continue for yet another indefinite period where the operator deems it necessary to seek Commission review. The complexity of cost of service showings, combined with the shortage of Commission resources, makes it difficult to predict how long an operator will have to await a final decision. The absence of finality makes proper financial planning virtually impossible, all to the detriment of operators and, ultimately, subscribers.

There are a number of steps the Commission could take to alleviate these concerns. The Commission should allow operators to increase rates subject to an accounting order. The Commission should also reduce the 90-day period franchising authorities have for analyzing benchmark and price cap showings. In addition the Commission must build elements of finality into its rules. Where a franchising authority fails to issue an accounting order at the time a rate takes effect the rate in question should be deemed final and not subject to additional review. Where an accounting is ordered the franchising authority must be required to finalize its process and issue its written decision within 30 days after the effective date of the rate. Finally, the Commission should allow operators to implement rate increases without potential refund liability if the Commission fails to decide an appeal within a reasonable time period, such as 60 or 90 days following initiation of the appeal.

VI. The Rules Governing Certification of Local Franchising Authorities Require Clarification.

A. The Commission Must Take Final Action on Effective Competition Challenges Within a Prescribed time Period.

The rules provide that a franchising authority's certification will be effective 30 days after filing unless the Commission determines that the statutory requirements have not been met. 47 C.F.R. § 76.910(e). Operators may challenge a franchising authority's certification

[redacted]

C. Franchise Authorities Should Be Permitted to Decertify and Terminate Local Regulation.

While the Commission's rules allow a local authority to cease rate regulation upon a determination that effective competition exists, 47 C.F.R. § 76.915(d), there is no other mechanism for "deregulating" cable rates. The Commission should amend its rules to provide a local franchising authority the ability to "decertify" if it believes that rate regulation is no longer in the best interests of the community.

In many cases, the cost of regulating an operator's rates may be greater than the savings, if any, that accrue to subscribers. Even where regulation is considered cost effective, a community may decide that its resources are better employed in more beneficial projects. Subscribers may believe that an operator's resources are better used to upgrade the system, provide new services or lower existing rates. The Commission should provide a mechanism for local authorities to make such a determination.

VII. The Commission Needs to Clarify Certain Points.

A. Proprietary Information Disclosure Should Be Minimized.

The Commission must clarify inconsistencies between the Order and its rate regulations to the effect that a franchising authority cannot request disclosure of proprietary information, except for equipment costs, unless it is analyzing an operator's cost-of-service showing. According to the Order, the right to additional information arises where the rates in question "exceed the Commission's presumptively reasonable level." Order at ¶ 130. However, the language of the rule regarding proprietary information is too broad and could be interpreted as applying to oversight of any rate. See 47 C.F.R. § 76.938 (production of proprietary information "to make a rate determination").

B. Only Regulate Rates for Changes in Regulated Services.

Congress granted the Commission power to promulgate "standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation . . . . " 47 U.S.C. § 543(b)(5)(C). However, Section 76.980 of the rules governs "charges for any changes in service tiers or equipment." The Commission is not empowered to regulate prices operators charge customers for changes to non-regulated services and equipment. The Commission should confirm that Section 76.980 applies only to regulated services.

C. Responses to Consumer Complaints Should Await Commission Determination That The Complaint is Meritorious.

Section 76.956(a) of the rules requires a cable operator to respond to the merits of a consumer complaint within 30 days unless the Commission notifies the operator otherwise.